

Appeal from a decision of the Associate Director for Policy and Management Improvement, Minerals Management Service, denying an appeal of an assessment of interest charges for the late payment of royalties on Federal Outer Continental Shelf lease Nos. 2327, 2418, and 2422. MMS-89-0091-OCS.

Affirmed.

1. Federal Oil and Gas Royalty Management Act of 1982: Assessments--Oil and Gas Leases: Royalties: Interest--Outer Continental Shelf Lands Act: Oil and Gas Leases--Payments: Generally--Statute of Limitations

The 6-year statute of limitations at 28 U.S.C. § 2415(a) (1994) for commencement by the United States of civil actions for damages does not apply to limit administrative action by the Department. An MMS order assessing interest charges for the late payment of royalties on Federal offshore oil and gas leases is an administrative action not subject to that statute of limitations.

2. Federal Oil and Gas Royalty Management Act of 1982: Assessments--Federal Oil and Gas Royalty Management Act of 1982: Penalties--Oil and Gas Leases: Royalties: Interest--Outer Continental Shelf Lands Act: Oil and Gas Leases--Payments: Generally--Statute of Limitations

The 6-year statute of limitations found at 30 U.S.C. § 1755 (1994) which governs actions to recover penalties imposed under the Federal Oil and Gas Royalty Management Act of 1982 does not apply to interest assessed in accordance with 30 U.S.C. § 1721 (1994) because civil penalties authorized by 30 U.S.C. § 1719 (1994) are legally distinct from interest charges for the late payment of royalties.

APPEARANCES: Jerry E. Rothrock, Esq., and Michael S. Ray, Esq., Washington, D.C., for appellant; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., and Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

## OPINION BY ADMINISTRATIVE JUDGE IRWIN

Oryx Energy Company (formerly Sun Exploration and Production Company and referred to hereafter as Oryx) has appealed from a decision of the Associate Director for Policy and Management Improvement, Minerals Management Service (MMS), dated February 18, 1993, and issued April 13, 1993, denying Oryx's appeal of a February 2, 1989, assessment of \$963,825.34 in interest charges for the late payment of \$2,233,806.13 in royalties for Federal Outer Continental Shelf (OCS) lease Nos. 2327, 2418, and 2422.

The Bureau of Land Management issued OCS lease No. 2327, effective February 1, 1973, and OCS lease Nos. 2418 and 2422, effective August 1, 1973. On July 16, 1987, the Tulsa Regional Compliance Office, MMS, notified Oryx that it was initiating an audit of Oryx's practices and procedures relating to the computation and payment of royalties due on minerals removed from Federal and Indian leases for the production months September 1981 through August 1987. MMS' examination of the reports of sales and royalty remittance (MMS-2014 forms) filed by Oryx during the audit period revealed that Oryx had identified \$2,233,806.13 of the remitted royalties reported for those three offshore leases on its January 1983 form as attributable to the sales months of July through December 1979.

On November 18, 1988, MMS informed Oryx that late payment charges for the royalties received in January 1983 apparently had neither been calculated nor paid and asked Oryx to provide information substantiating the payment of any interest assessment for the late payment of those royalties. Oryx replied on December 7, 1988, asserting that MMS had previously assessed late payment charges for the untimely royalties and providing ostensibly supporting documentation. MMS analyzed the material submitted by Oryx, including a January 23, 1986, MMS letter assessing interest for the underpayment of royalties for OCS lease Nos. 2418 and 2422 for the production month of December 1978, and concluded that this interest assessment did not pertain to the royalties paid in January 1983. Therefore, by letter dated December 29, 1988, 1/ MMS advised Oryx of its preliminary determination that Oryx had neither paid nor been assessed interest charges for the late payment of those royalties and that, therefore, late payment charges were due. Oryx responded by letter dated January 27, 1989, asserting that the production months at issue had been included within an earlier MMS lookback audit and that all the liabilities for that audit period had been paid and should be considered closed.

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1/ This letter, which apparently was issued by the Dallas Area Compliance Office, MMS (see Oryx's Jan. 27, 1989, response addressed to the Dallas Area Compliance Office), does not appear in the case file but is referred to by both MMS and Oryx. We once again remind MMS that it is obligated to submit the complete case file to the Board.

By letter dated February 2, 1989, the Dallas Area Compliance Office, MMS, concluded that Oryx had neither paid nor been assessed interest for the January 1983 payment of royalties due for production from OCS lease Nos. 2327, 2418, and 2422 during the production months of July through December 1979 and, accordingly, assessed Oryx late payment charges of \$963,825.34 for those untimely royalty payments. In so doing, MMS rejected Oryx's contention that late payment assessment was inappropriate because the production period at issue was included in the earlier lookback audit of the period January 1977 through August 1981, finding, instead, that the interest demand was proper since the late royalty payments precipitating the assessment had been remitted during the current audit period.

Oryx sought review of the assessment by the Director, MMS, arguing that the late payment charge was time barred both under the provision of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1755 (1994), which limited actions to recover penalties imposed under the Act to those commenced within 6 years after the date of the act or omission upon which the penalty was based, and the general 6-year Federal statute of limitations for contract actions found at 28 U.S.C. § 2415 (1994). Oryx explained that, after an MMS audit of the sales months of July through December 1979 had uncovered inadvertent clerical errors, MMS had assessed Oryx additional royalty due in the amount of \$2,233,806.13 for production from the three leases during those months. Although Oryx paid the additional royalty on January 31, 1983, MMS did not impose the late payment charges until February 2, 1989, over 6 years after the date of Oryx's payment. Apparently equating the late payment assessment with a civil penalty, Oryx argued that MMS' failure to demand the assessment within 6 years of the January 1983 payment of the deficient royalties, the time at which the amount of the interest due was established, prevented MMS from now demanding the interest payment. Similarly, Oryx contended that since over 6 years had passed from the January 1983 accrual of the alleged debt without MMS filing a complaint against Oryx, the claim was precluded by 28 U.S.C. § 2415 (1994).

In her February 18, 1993, decision, the Associate Director denied Oryx's appeal of the interest assessment for the late payment of royalties for OCS lease Nos. 2327, 2418, and 2422. After noting that MMS had the legal obligation to assess late payment charges on all debts not received by the due date, the Associate Director explained that such assessments were intended to compensate the lessor for the replacement cost of funds due but not timely paid and were, therefore, the equivalent of the time value of money, rather than a penalty, because the appellant had retained the use of the funds during the period they were not timely paid. Her determination that late payment charges were not penalties but simply reimbursement for the time value of money led the Associate Director to conclude that FOGRMA's 6-year limitation period for penalty actions, 30 U.S.C. § 1755 (1994), was inapplicable. She further found that the

general Federal statute of limitations, 28 U.S.C. § 2415 (1994), addressed the time for the commencement of actions in Federal district court, not administrative appeals, and therefore did not affect MMS' right to impose the interest charges at issue. Accordingly, the Associate Director denied the appeal.

In its appeal to the Board, Oryx disputes the Associate Director's conclusion that 28 U.S.C. § 2415 (1994) does not apply to MMS' late payment assessment, which Oryx characterizes as a claim for money damages under the lease agreements. Oryx insists that MMS may not convert a claim for money damages into an action for specific performance to pay royalties in an attempt to avoid the statute of limitations, asserting that the Government's sole remedy for breach of its lease contracts is an action for damages which is now time-barred by the 6-year Federal statute of limitations for contract actions. Oryx argues that the Government does not preserve its right to collect disputed payments by simply issuing an administrative order to pay which, if unpaid, can then be pursued through an action to enforce the administrative order unconstrained by any limitations period. Instead, Oryx submits, the language of 28 U.S.C. § 2415 (1994) requires the Government to file an action for damages in order to retain its right to collect royalties and clarifies that administrative proceedings giving rise to administrative orders are not intended to be substitutes for, but rather precursors to, actions for money damages. Oryx contends that accepting the Associate Director's decision would thwart the limitations statute's goals of barring stale Government claims, ensuring fairness by putting private and governmental litigants on an equal footing, encouraging early trials while documents are available and memories fresh, improving claims procedures, and prompting agencies to timely refer their claims to the Department of Justice for collection.

Alternatively, Oryx insists that MMS' assessment of late fees is barred by FOGRMA's 6-year statute of limitations for the recovery of penalties, 30 U.S.C. § 1755 (1994). Oryx challenges the Associate Director's conclusion that the additional payments are not penalties within the meaning of 30 U.S.C. § 1755 (1994), asserting that since her decision finds that the payments are not money damages within the meaning of 28 U.S.C. § 2415 (1994), they must be penalties. Oryx discounts MMS' characterization of the assessment as interest, asserting that

the government has never claimed (much less proved) that the total royalties that it received for these leases for the production months of July 1979 through December 1979 are less than the total royalties due on each lease for each such production month. Under these circumstances, the government may not properly claim that the demanded payments merely compensate the government for the time value of "late" royalty payments and, as a result, do not constitute "penalties" within the meaning of 30 U.S.C. § 1755.

(Supplemental Statement of Reasons (SOR) at 13 n.9.)

Finally, Oryx argues that, in any event, the Associate Director's decision should be rescinded because MMS failed to follow its own precedents governing the offsetting of royalty underpayments and overpayments. Those precedents, Oryx avers, require MMS to reduce any claimed royalty underpayments during the audit period with royalty overpayments during the same period on that same lease. Oryx maintains that the Board should remand the decision for additional proceedings on the offset issue, adding that even if MMS were totally unaware of any offsets, Oryx is still entitled to a remand for the purpose of documenting offsets.

Although it seeks to take advantage of the MMS offset policy, Oryx, nevertheless, objects to MMS' restriction of offsetting to royalty underpayments and overpayments on the same lease, arguing that the limitation is unlawful because it was adopted without compliance with the rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1994), exceeds the Department's statutory authority, and gives the Government an undeserved royalty windfall. Thus, Oryx asserts that, if the appealed decision is upheld, the company should be permitted to reduce the assessment by the amount of royalty overpayments on its Federal offshore leases.

In its answer MMS contends that the general statute of limitations at 28 U.S.C. § 2415 (1994) does not preclude affirmance of the Associate Director's decision, citing numerous Board decisions holding that statutes of limitations do not bar administrative actions. MMS also insists that the statute of limitations at 30 U.S.C. § 1755 (1994) governing FOGDRA civil penalties does not prohibit the assessment of late payment charges because the explicit terms of that statutory provision limit its applicability to penalty assessments exclusively. Since interest assessments are legally distinct from penalty assessments, MMS avers that 30 U.S.C. § 1755 (1994) cannot act as a bar to the assessment and collection of late payment charges.

MMS strenuously objects to Oryx's request that the appeal be remanded to allow Oryx to document offsets. MMS suggests that Oryx's failure to assert even one overlooked overpayment on any of the leases at issue reveals that Oryx's primary objective is to attack the limitation of offsets to payments made on the same lease. Oryx's unsupported contention that it should be allowed to offset unrelated overpayments made on any of its other offshore leases against the amount due under the challenged decision, MMS asserts, directly contradicts the established principle that, because leases are separate property arrangements, the maintenance of a workable royalty accounting system compels restricting offsetting of past royalty overpayments and underpayments to payments on a single lease.

MMS maintains that any issues regarding offsetting within the individual leases at issue should have been resolved at the time MMS assessed the principal upon which the late payments charges are based, noting that, as recounted by Oryx, an audit uncovered the underlying royalty underpayments and the exact amount due was determined in January 1983. MMS suggests that the Department would have offset any over- and underpayments occurring on each lease at the time of the audit, adding that Oryx has

not alleged that the lease-specific offsetting did not occur. MMS argues that Oryx's attempt to challenge the underlying royalty assessment now via a proceeding disputing the demand for late payment charges runs afoul of the doctrine of administrative finality because Oryx's chance to contest the royalty determination has long since passed. Oryx's failure to raise the offset issue during the pendency of its appeal before the Director or submit any evidence to substantiate its allegations of overpayment, MMS submits, further thwarts the company's attempt to satisfy its burden of showing error in the Associate Director's decision. Therefore, MMS asserts that the Board must affirm the decision without remanding the appeal for consideration of offsets.

[1] As an initial matter, we reject Oryx's contention that the 6-year statute of limitations at 28 U.S.C. § 2415(a) (1994) precludes the MMS demand for late payment charges. That section, which governs the time for commencing judicial actions brought by the United States, provides in part:

Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later \* \* \*.

28 U.S.C. § 2415(a) (1994). This Board has held numerous times that statutes establishing time limits for the commencement of judicial actions for damages on behalf of the United States do not limit administrative proceedings within the Department of the Interior. See Texaco Exploration & Production, Inc., 134 IBLA 267, 270 (1995); Texaco, Inc., 134 IBLA 109, 116 (1995); Chevron U.S.A., Inc., 129 IBLA 151, 154 (1994), and cases cited. We have also specifically refused to find that MMS assessments of late payment charges are precluded by that provision. Marathon Oil Co., 128 IBLA 168, 170-71 (1994). Cf. Chevron U.S.A., Inc., *supra*, and cases cited (explicitly holding that 28 U.S.C. § 2415(a) (1994) does not bar MMS demands for additional royalty).

A demand for the payment of interest charges is not a judicial action for money damages brought by the United States, but rather is an administrative action not subject to the statute of limitations. See S.E.R., Jobs for Progress, Inc. v. United States, 759 F.2d 1, 5 (Fed. Cir. 1985); Chevron U.S.A., Inc., *supra*; Alaska Statebank, 111 IBLA 300, 311-12 (1989). As the U.S. Court of Appeals for the Fifth Circuit has stated:

The term "action for money damages" refers to a suit in court seeking compensatory damages. The plain meaning of the statute bars "every action for money damages" unless "the complaint is filed within six years." (Emphasis added.) Thus, actions for money damages are commenced by filing a complaint.

Actions that do not involve the filing of a complaint are not "action[s] for money damages." Since the government has filed no complaint, the agency action is not a[n] action for money damages." Thus, [28 U.S.C.] § 2415 is no bar.

(Sept. 7, 1994, order granting rehearing of its opinion in Phillips Petroleum Co. v. Johnson, 22 F.2d 616 (5th Cir. 1994), and affirming the district court's grant of summary judgment to the defendants in two of four consolidated cases, at 3-4, quoted in Texaco Exploration & Production, Inc., 134 IBLA at 270-71).

We are without authority to decide whether the statute of limitations would bar a judicial suit to collect interest demanded for the late payment of royalties owing on a lease; such a determination would be made by the court before which any collection proceeding is brought. See Texaco, Inc., 134 IBLA at 117; Marathon Oil Co., 119 IBLA 345, 352 (1991); Alaska Statebank, 111 IBLA at 312; see also Phillips Petroleum Co. v. Lujan, 951 F.3d 257, 259-60 (10th Cir. 1991). None of Oryx's arguments persuades us that the 6-year limitation period in 28 U.S.C. § 2415(a) (1994) should be read expansively to apply to administrative proceedings. We, therefore, hold that 28 U.S.C. § 2415(a) (1988) does not prevent MMS from demanding that Oryx pay the interest assessed for its late payment of royalties.

[2] We also reject Oryx's contention that MMS' assessment of a late payment charge is precluded by section 307 of FOGPMA, 30 U.S.C. § 1755 (1994), which provides that, "[e]xcept in the case of fraud, any action to recover penalties under this chapter shall be barred unless the action is commenced within 6 years after the date of the act or omission which is the basis for the action." The assessment at issue here, however, is not a civil penalty imposed under the authority granted by 30 U.S.C. § 1719 (1994), but rather interest on the late payment of royalty authorized by 30 U.S.C. § 1721(a) (1994).

Section 111(a) of FOGPMA, 30 U.S.C. § 1721(a) (1994), specifically provides, in the case of oil and gas leases, that "where royalty payments are not received by the Secretary on the date that such payments are due, or are less than the amount due, the Secretary shall charge interest on such late payments or underpayments." Departmental regulation 30 CFR 218.54 implements this statutory provision. See also 30 CFR 218.150. Moreover, the Board has held that the Government has the authority, independent of any statutory grant thereof, to make a unilateral determination of interest owed. See Yates Petroleum Corp., 104 IBLA 173, 176 (1988), and cases cited; see also Shell Offshore, Inc., 115 IBLA 205, 212 (1990), and cases cited. Such interest charges reimburse the Government for the time value of royalties due but not yet paid. Santa Fe Energy Co., 110 IBLA 209, 211 (1989); Cities Service Oil & Gas Corp., 104 IBLA 291, 295 (1988); Sun Exploration & Production Co., 104 IBLA 178, 186-87 (1988); Peabody Coal Co., 72 IBLA 337, 348 (1983). Because interest charges are designed to compensate for the time value of money and not to penalize, such assessments are not penalties within the meaning of 30 U.S.C. § 1719

(1994). Coastal Oil & Gas Corp., 108 IBLA 62, 67 (1989). Therefore, the statute of limitations found at 30 U.S.C. § 1755 (1994) does bar MMS' demand for late payment charges. Cf. Forest Oil Corp., 111 IBLA 284, 286 (1989) (30 U.S.C. § 1755 does not block MMS' efforts to collect additional royalty due).

Oryx does not explicitly deny that penalties and interest assessments are legally distinct; rather, the company apparently questions whether the assessment at issue really is a late payment charge, contending that MMS has neither claimed nor proven that the royalties it received for the production months of July through December 1979 for the three offshore lease were less than the total royalties due on each lease for each production month. The record, however, flatly contradicts Oryx's contention. Oryx itself admits in its appeal submission to the Director, MMS, that an earlier MMS audit encompassing those three months exposed inadvertent clerical errors by Oryx, resulting in the assessment of additional royalty due in the amount of \$2,233,806.13. See Mar. 2, 1989, Notice of Appeal at 2. Oryx does not allege, nor does the record indicate, that Oryx appealed the MMS assessment of the additional royalty for those production months. MMS received Oryx's payment of the additional royalty on January 31, 1983.

The applicable regulation, 30 CFR 218.50(a), provides in pertinent part that "[r]oyalty payments are due at the end of the month following the month during which the oil and gas is produced and sold." Section 3(a)(3) of all three of the OCS leases at issue similarly establishes that royalties on production are "due and payable monthly on the last day of the month next following the month in which the production is obtained." Since the additional royalties were not paid until January 31, 1983, long after the due dates for royalties for the production months of July through December 1979, Oryx's payment of those royalties was untimely and properly subject to a late payment charge in accordance with 30 U.S.C. § 1721(a) and 30 CFR 218.54 and 218.150. MMS' assessment of \$963,825.34 is undeniably an interest charge for the late payment of royalties and not a penalty. 2/

Finally, Oryx's request that the case be remanded to MMS to allow Oryx to offset royalty overpayments on its Federal offshore leases against the amount claimed by MMS must be dismissed for lack of jurisdiction because

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2/ In its SOR Oryx also frequently characterizes the MMS assessment as a royalty demand. As the discussion in the text clarifies, MMS does not seek additional production royalty but simply interest for the late payment of previously remitted royalty amounts.



this issue was not raised before the Associate Director. ANR Production Co., 110 IBLA 127, 128 (1989). In any event, Board precedent clearly establishes that the offsetting of royalty overpayments on Federal offshore oil and gas leases against royalty underpayments generally is permitted only within the royalty account of a single lease after an official audit. Chevron U.S.A., Inc., 129 IBLA at 155, and cases cited. The failure to promulgate the single lease policy in accordance with the rulemaking requirements of the APA, 5 U.S.C. § 553 (1994), does not invalidate that restriction because the limitation emanated from adjudication and, therefore, is not subject to the APA's notice and comment provisions. Union Exploration Partners, Ltd., 127 IBLA 220, 223 (1993), and cases cited. Furthermore, as discussed above, the assessment at issue is an interest charge, not a royalty underpayment, and the validity of the royalty payments upon which the interest charge is based was not timely challenged by Oryx. Thus, the doctrine of administrative finality precludes reconsideration of the appropriateness of the underlying late royalty payments, including whether MMS properly offset royalty overpayments and underpayments on each lease in calculating the royalty due. See Ray L. Verg-in, 133 IBLA 1, 4 (1995), and cases cited.

To the extent Oryx has raised issues not specifically addressed herein, we have considered and rejected them.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Will A. Irwin  
Administrative Judge

I concur:

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Franklin D. Arnese  
Administrative Judge